Supreme Court of the United States

OCTOBER TERM, 1939

No. 383

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

vs.

GEORGE B. CLIFFORD, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENT

F. H. STINCHFIELD,
THOMAS P. HELMEY,
Attorneys for Respondent.

STINCHFIELD, MACKALL, CROUNSE,
McNALLY & MOORE,
Of Counsel.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX.

CASES CITED.

STATUTES.

MISCELLANEOUS AUTHORITIES.

TEXT AUTHORITIES.

Supreme Court of the United States

OCTOBER TERM, 1939

No. 383

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

vs.

GEORGE B. CLIFFORD, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the United States Board of Tax Appeals (R. 7) is unreported. The opinion of the Circuit Court of Appeals (R. 29) is reported in 105 F. (2d) 586.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1939 (R. 35). The petition for a writ of certiorari was filed September 13, 1939, and was granted November 6, 1939. The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer in 1934 declared himself trustee of certain property to pay the net income therefrom to his wife, the trust to terminate at the expiration of five years or upon the earlier death of the taxpayer or his wife. Upon the termination of the trust, the corpus was to be restored to the grantor or his estate but any undistributed net income was to be treated as the property of the wife. The question is whether the provisions of the Revenue Act of 1934 make the income of the trust taxable to the respondent.

STATUTE INVOLVED

The pertinent statute, Revenue Act of 1934, c. 277, 48 Stat. 680, Section 166, is printed in the Appendix. Petitioner says that Section 22 (a) of the same Act is also pertinent; that section is therefore printed in the Appendix.

STATEMENT

The following additions and corrections are made in the summary of facts at pages 2 to 4 of petitioner's brief:

The respondent had made a gift tax return for 1934 which included the gift in trust to Mrs. Clifford (R. 23). The respondent over a period of years had made gifts of substantial sums to his wife and children (R. 23). The powers of the respondent as trustee were only those mentioned in the trust instrument (R. 25), which are summarized in petitioner's brief at page 3.

SUMMARY OF ARGUMENT

Income is taxable to the legal owner thereof. This rule is confirmed by specific sections which apply to the income of trusts. Sections 161 and 162 of the Revenue Act of 1934, c. 277, 48 Stat. 680, and corresponding sections of prior revenue acts since 1916 have set up a general scheme for taxation of trusts.[1] Trusts are made taxable entities as individuals and corporations. The income of the trust is taxable to the trust with an additional credit for income currently distributed to beneficiaries, but the beneficiaries of the trust are taxed on the income so distributed. Under the general rule taxing income to the owner and under the specific provisions of the Revenue Act of 1934, the income distributed to Mrs. Clifford is taxable to Mrs. Virginia Clifford and not the respondent.[2]

The present trust is not within the exception created by Section 166 of the Revenue Act of 1934.[3] That section and

---

[1] The trust was made a taxable person in the Revenue Act of 1916, c. 463, 39 Stat. 756, §2 (b). The present scheme was more completely adopted in the Revenue Act of 1924, c. 234, 43 Stat. 253, §219 (a, b). The sections were re-numbered in the sequence of the Revenue Act of 1934, in the Revenue Act of 1928, c. 852, 45 Stat. 791, §§161, 162. See 4 Paul and Mertens, Law of Federal Income Taxation, §§34.01-34.03.

[2] Capital gains were returned as taxable to the trust (R. 10). The taxability of such capital gains is not before the court. (Petitioner's Brief, 12.)

[3] Section 166 first appeared in the Revenue Act of 1924, c. 234, 43 Stat. 253, as Section 219 (g). The edition was unchanged in the Revenue Act of 1926, c. 27, 44 Stat. 9, §219 (g) and the Revenue Act of 1928, c. 852, 45 Stat. 791, §166. The section was amended in the Revenue Act of 1932, c. 209, 47 Stat. 169, §166. The original section provided:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

its predecessors refer to revocable trusts. This is not a revocable trust in the commonly accepted meaning of the word "revocable." No legislation as to term trusts was intended. The only purpose of the amendment of Section 166 in the Revenue Act of 1934 was to remove the words which limited the application of the section to trusts revocable during the taxable year.

The trust is clearly valid. The owner of property may properly declare himself trustee. There are no provisions in the declaration of trust which are not common in trust instruments. In fact, the petitioner makes no claim that the trust is invalid.

The petitioner argues that respondent is the substantial owner of the trust corpus and is therefore taxable on the income of the trust, but there being no express statute, the Department cannot by its regulations create a new kind of ownership. *Smietanka vs. First Trust and Savings Bank*, 257 U. S. 602. Nor can the absence of a statute be supplied by a regulation on the reasoning that if there had been a statute, it might have been valid. *Du Pont vs. Commissioner*, 289 U. S. 685. The petitioner concedes (Brief, 13) that not all irrevocable term trusts should be taxed to the settlor. The line suggested by petitioner "between those irrevocable trusts which deprive the grantor of command over the trust property and those which leave in him the practical equivalent of ownership," has no basis in statute or judicial precedent. The drawing of such a line, and more particularly the declaration of such a policy, is peculiarly a task for Congress, which is charged with the making of tax laws. If the statutory scheme for taxation of trusts is to be changed, the change must be made by Congress.

ARGUMENT

In order to impose tax on the respondent with respect to trust income which he did not receive, the petitioner urges two propositions: That respondent was in substance the owner of the trust property and income; that the trust was revocable within Section 166. Neither proposition is correct. Respondent is not taxable on trust income.

I.

Respondent Was Not in Substance the Owner of the Trust Property.

1. The petitioner does not question that respondent made a valid trust under the laws of the state of Minnesota. *Mason's Minnesota Statutes (1927)*, §8090; *In re Estate of Marshall*, 179 Minn. 233, 228 N. W. 920; 1 *Scott on Trusts*, §17.01. The Supreme Court of Minnesota said in *Estate of Marshall, supra*, at page 241:

> "The state makes much of the fact that Marshall was selected as executive trustee and was by resolution of the trustees empowered to transact the business of the trust as if he were the owner. This is not of great significance in view of what appears to be settled law, that a donor may create a valid trust naming himself as the sole trustee. 39 *Cyc.*, p. 66; 1 *Perry, Trusts* (7 ed.), §96; *Reinecke vs. Northern Tr. Co.*, 278 U. S. 339, 49 S. Ct. 123, 73 L. ed. 410. Moreover, it took more than his own vote to make him executive trustee or to give him the authority which the resolution of all the trustees gave him. He reserved no power over the interest of his wife and children in the trust, nor did the trustees assume to grant him any."

The petitioner does not question the validity of the trust

under Federal tax laws. The respondent may declare himself the trustee of his own property. As trustee, he may retain adequate powers for the proper administration of the trust. *Reinecke vs. Northern Trust Co.*, 278 U. S. 339; *Becker vs. St. Louis Union Trust Co.*, 296 U. S. 48; *Commissioner vs. Waterbury*, 97 F. (2d) 383 (C. C. A. 2nd); *McCrory vs. Commissioner*, 69 F. (2d) 688 (C. C. A. 5th); *Dunning vs. Commissioner*, 36 B. T. A. 1222. In *Reinecke vs. Northern Trust Co., supra*, the court said at page 346:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax."

The trust was clearly not one without substance. By the declaration of trust the respondent irrevocably parted with all income from the trust corpus accruing during the five-year period. There was no way that the respondent could reacquire legally the trust income; any action to that end would have amounted to a breach of trust and, criminally speaking, to embezzlement. As a matter of fact, the income of the trust for the year in question was distributed in full to the beneficiary. For the period of the trust the settlor lost the beneficial use of the corpus. He lost the right to make a gift to any one of any part of the corpus; he was under a disability to make a sale of any part of the corpus

to himself individually; the proceeds of a sale to anyone else were subject to the trust and could not be used personally by him; he was unable to make a loan of any part of the corpus to himself; he lost the right to use the trust corpus as collateral to secure personal loans for himself. During the five-year period the petitioner had also undertaken certain duties and responsibilities. He was under a duty to administer the trust for the sole benefit of the beneficiary; he was under a duty to render accurate accounts, and to allow an inspection to the beneficiary; he was under a duty to preserve the trust corpus and enforce claims; and he was obliged to use reasonable care and skill in making the trust property productive.

Because the trust has substance, it differs from the sale, which lacked substance, in *Higgins vs. Smith*, No. 146, this term. After the sale, the taxpayer's balance sheet in that case was the same as before; after the creation of the trust in this case, the respondent had reduced his assets by the value of the trust for the term. After the sale in *Higgins vs. Smith, supra*, the taxpayer could immediately secure return of stock to his personal ownership; after the creation of the trust, the respondent could not regain ownership of his securities for five years. See G. C. M. 4208, C. B. VII-2, 142.

2. The petitioner seeks to have a new administrative policy established as law, to-wit: The income of a trust shall be taxable to the grantor, where *in the opinion* of the Department the grantor is in substance the owner of the corpus, even though there be a valid trust under the law of the state where it is created, even though it be valid for other Federal tax purposes, and even though it cannot be regarded as lacking in substance.

There is no provision of any Revenue Act thus classifying trusts. Nor is the absence of such a statute dispensed with by referring to decisions of this court which perhaps suggest that if Congress had passed such a statute taxing certain trusts to the grantor, these statutes would be constitutional. *Du Pont vs. Commissioner*, 289 U. S. 685. In that case, the court upheld the constitutionality of an Act of Congress. The Act in clear and specific language taxed the income of a trust to pay premiums on the settlor's life to the settlor. The fact that the trust there involved was for a three-year term was an additional reason for finding that in that instance Congress had not violated due process. The issue here, however, is not as to the power of Congress but as to its intent. *Poe vs. Seaborn*, 282 U. S. 101.

The notion that a person may be taxed on income from property for the reason that he is the substantial owner thereof has been repudiated. *Poe vs. Seaborn, supra.* The court said at page 111:

> "The commissioner contends, however, that we are here concerned not with mere names, nor even with mere technical legal titles; that calling the wife's interest vested is nothing to the purpose, because the husband has such broad powers of control and alienation, that while the community lasts, he is essentially the owner of the whole community property, and ought so to be considered for the purpose of Sections 210 and 211.
>
> * * * * * * * * *
>
> "We think in view of the law of Washington above stated this contention is unsound."

In view of the express provisions of the Revenue Act of 1934 and the decisions of this court with relation to trusts, the petitioner's contention here is just as unsound.

Some such general doctrine was used by the Board Mem-

ber in his decision in this case (R. 11). But the correct test was applied by the Circuit Court of Appeals. Do the powers of trustee "defeat" the trust? The court found that they did not (R. 32). The Board Member cited as authority for his view *Warren H. Corning*, 36 B. T. A. 301 (R. 11). This decision was reversed by the Circuit Court of Appeals for the Sixth Circuit. *Corning vs. Commissioner*, 104 F. (2d) 329 (C. C. A. 6th). That court applied the same test and reached the same conclusion with respect to the facts there involved as did the court below in the case at bar. The court said at page 333:

> "There is no ground for support of the Board's determination that the present trusts are not taxable entities or that the instruments amount to no more than an assignment of income."

No statutory basis for the new theory can be found in Section 22 (a) of the Revenue Act of 1934. This section is not a general enabling act for departmental definition of income. *Smietanka vs. First Trust and Savings Bank*, 257 U. S. 602. In holding income received by a trustee for the benefit of unborn children was not liable to tax under the Revenue Act of 1913, c. 16, 38 Stat. 114, the court said at page 605:

> "No language in the act included a tax on income received by a trustee, by him to be accumulated for unborn or unascertained beneficiaries. There was indicated in the taxing, Par. A, the congressional intention to tax citizens everywhere, and non-citizens, resident in the United States, including persons, natural and corporate, on income from every source, less allowed deductions. But nowhere were words used which can be stretched to include unborn beneficiaries for whom income may be accumulating. It may be that Congress had a general intention to tax all incomes, whether for

> the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise, the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication."

Certainly, the basis for the implication suggested here by petitioner is stronger where the income is not subject to any tax.

This section in practically identical words has been a part of income tax laws since 1913.[4] Prior to the amendment of Section 166 of the Revenue Act of 1934, there was no regulation like Article 166-1 of Treasury Regulations 86 attempting to tax the income of term trusts to the settlor.[5] The uniform construction of Section 22 was contrary to the present construction. The coincidence of the Revenue Act of 1934 and the new Article suggests that Section 166 is the only possible statutory basis for the regulation. The propriety of the regulation as a construction of that section will be discussed in argument under that section.

3. Before proceeding to that argument, a distinction should be noted between an assignment of income and the

---

[4]Revenue Act of 1913, c. 16, 38 Stat. 114, Par. B (1):

"That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation, or personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits, and income derived from any source whatever including the income from, but not the value of property acquired by gift, bequest, devise, or descent."

[5]See Article 881 of Regulations 77, which does no more than restate Sections 166 and 167 of the Revenue Act of 1932, c. 209, 47 Stat. 169, under which it issued.

creation of a trust. The actual owner of property and earnings remains liable even after he has assigned the income from the property and the earnings. *Lucas vs. Earl*, 281 U. S. 111. After an owner has transferred his property by sale or gift, the income of that property after the transfer is taxable to the new owner. The owner may give away a fee in some of his real estate or he may give a limited estate in all his real estate. The owner may create a trust for a term of years in a part of his personal property for the benefit of another. The beneficiary becomes the owner of an equitable interest in the property. The income during the term is the income of the beneficiary, not of the settlor. *Irwin vs. Gavit*, 268 U. S. 161; *Blair vs. Commissioner*, 300 U. S. 5. By the declaration of trust, Mrs. Clifford became the owner of an equitable interest in the trust *res;* the income during the term is her income, not the income of the respondent. The difference between an assignment and a trust is a difference in kind and not of duration; of quality, not of quantity.

The court below made the distinction clear (R. 32):

> "The rule announced in *Lucas vs. Earl*, 281 U. S. 111, and *Burnet vs. Leininger*, 285 U. S. 136, to the effect that the actual earner or recipient of income cannot by assignment avoid the statutory liability is not pertinent, because as owner of the beneficial interest, the beneficiary here is entitled to the income therefrom and is in turn taxed on that income by the statute. As said in *Blair vs. Commissioner, supra:*
>
> " 'These cases are not in point. The tax here is not upon earnings which are taxed to the one who earns them. Nor is it a case of income attributable to a taxpayer by reason of the application of the income to the discharge of his obligation. * * * There is here no question of evasion or of giving effect to statutory pro-

visions designed to forestall evasion; or of the taxpayer's retention of control. * * * In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership.' "

II.

The Trust Is Not Revocable.

The material parts of the statute (Section 166) and of the trust instrument (R. 25) are:

> "Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—
>
> "(1) in the grantor, * * *
>
> * * * * * * * * *
>
> "then the income of such part of the trust shall be included in computing the net income of the grantor."
>
> "2. The trust hereby created shall continue for a term of five (5) years from the date of this Declaration of Trust unless the life beneficiary or myself shall die during said term, and at the expiration of said term or upon the earlier death of the life beneficiary or myself during said term, whichever event shall first occur, the trust hereby created shall forthwith and without any further act or deed terminate."

The reading of the two provisions does not even suggest that the statute covers this trust. The respondent's reversionary interest following a trust for years is not a "power to revest." This conclusion is confirmed by the accepted meaning of words, the reasoning of prior decisions, and the legislative history of the legislation. Treasury Regulations cannot enlarge, under the guise of construction, the clear meaning of a statute.

1. The words used in the statute have a generally accepted meaning.

A power to revest certainly denotes an ability of grantor or someone else to effect a change in title, ownership, or enjoyment of property by the voluntary doing of an act:

Funk & Wagnall's New Standard Dictionary of the English Language (1937): "1. Ability to act so as to produce some change or bring about some event; * * * 2. Such absence of restraining influence as leaves power of volition to the subject; * * * 4. The right, ability or capacity to exercise authority or control."

Black's Law Dictionary (Third Edition, 1933), and *Bouvier's Law Dictionary* (Third Revision, 1914): "The right, ability, or faculty of doing something."

Reversions and reversionary interests have been defined as follows:

Bouvier's Law Dictionary (Third Revision, 1914): "*Reversion.* The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. * * * The reversion is a vested interest or estate and arises by operation of law only."

21 *Corpus Juris* 1016: "*Reversion.* An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him."

2. The distinction between a reversion and a power to revest has been consistently applied by the courts and the Board of Tax Appeals.

This court has recently so clearly noted the distinction that further authority seems a supererogation. *Sanford's Estate vs. Commissioner*, No. 34, this Term. The court said:

"Nor do we think that the provisions of §219 (g) of the 1924 Act have any persuasive influence on the construction of the gift tax provisions with which we are now concerned. One purpose of the gift tax was to prevent or compensate for the loss of surtax upon income where large estates are split up by gifts to numerous donees. Congress was aware that donors in trust might distribute income among several beneficiaries, although the gift remains so incomplete as not to be subject to the tax. It dealt with *that contingency in §219 (g) which taxes to the settlor the income of a trust paid to beneficiaries where he reserved to himself an unexercised power to 'revest in himself title' to the trust property producing the income.*" (Italics ours.)

The first court decision was under an earlier revenue act. *United States vs. First National Bank of Birmingham*, 74 F. (2d) 360 (C. C. A. 5th). The grantor made a conveyance in trust for *one year* from October 1, 1928, to September 30, 1929. The Commissioner included in grantor's income for 1929 the income of trust from Jan. 1, 1929, to September 30, 1929. The Commissioner invoked Section 166 of the Revenue Act of 1928, which provided that income of a trust was taxable to the grantor if he had "at any time during the taxable year * * * the power to revest in himself title to any part of the corpus of the trust." In holding that the grantor was not taxable on such trust income, the court said at page 362:

"It was not such a trust as is described in the above set out provision of the statute, as the grantor did not have, at any time during the taxable year 1929, or at any other time, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust. By that instrument the entire property rights in the described real estate for the period stated were irrevo-

cably vested in the grantee. The estate granted being one limited to endure for a definite and ascertained period, fixed in advance, is what is known as an estate for years. *Hyatt vs. Vincennes Nat. Bank*, 113 U. S. 408, 5 S. Ct. 573, 28 L. Ed. 1009; 35 *C. J.* 970; 10 *R. C. L.* 662. The corpus of the trust was the granted estate in the described property for the stated period. The income from that property during that period was the grantee's income, not the grantor's income, as it was subject to the unfettered command of the grantee, not subject to any power over it exercisable by the grantor; the source of it being a property interest or estate irrevocably vested in the grantee. * * * (Citing authorities.) The income in question was not taxable against appellee's testator because he did not own that income, or have any beneficial interest therein when it accrued, *and did not have the power either alone or in conjunction with any person not a beneficiary of the trust, to revest in himself the title to the property interest or estate which was the* source of that income." (Italics ours.)

The language of the court below in the present case is clear on this point (R. 34):

"The grantor in the instant case was given no power of revocation or revestment. The trust was absolute for the period of five years, except that it might terminate sooner by events beyond the control of the petitioner. Generally, a power of revocation is the reservation of a power in the grantor to put an end to the estate granted. *Tiffany, Real Property*, 2nd Ed., p. 1049. In this Section 166, the word 'revest,' clearly means the power reserved to the grantor to terminate a granted estate. *United States vs. First Natl. Bank of Birmingham* (C. C. A. 5), 74 F. (2d) 360. An existing right in property is not a power, but power is the right, ability or faculty of doing something. *Bouvier's Law Dic-*

tionary, p. 2646. Here, manifestly, petitioner had no power to divest nor abridge the existing estate, and hence, the trust income is not affected by Section 166, *supra*."

The language of the Board in the companion case is similarly clear. *Wood vs. Commissioner*, 37 B. T. A. 1065, 1068:

"In neither the original nor the supplementary declaration of trust was any power of revocation reserved to the petitioner or anyone else. The trust could be terminated only upon the happening of one of the three events specified in the original and supplementary declarations, *viz.*, the death of the grantor or of the beneficiary, or the termination of a five-year period from April 8, 1931, and petitioner, the grantor, had no control over the happening of such events. The trust constituted the grant of an estate for years and the beneficiary became the owner of an equitable interest in the corpus, *Blair vs. Commissioner*, 300 U. S. 5. Since section 166, *supra*, deals only with revocable trusts, and since the trust here in question was not, under the terms of the instruments creating it, revocable at any time during the period fixed for its duration, that section is not applicable in the instant case."

The petitioner has collected most of the other Board cases at page 25 of his brief.

3. The legislative purpose of the 1934 amendment of Section 166 confirms the foregoing conclusion.

A provision similar to Section 166 first appeared as Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253. Prior to the 1934 amendment, the provision had taxed income to the grantor "where at any time *during the taxable year* the power to revest in the grantor title to any part of the corpus is vested" in him. A number of decisions had

refused to apply this statute to admittedly revocable trusts, where the trust was not revocable in the taxable year. *Langley vs. Commissioner*, 61 F. (2d) 796 (C. C. A. 2nd); *Lewis vs. White*, 56 F. (2d) 390 (D. C. Mass.); *Ashforth vs. Commissioner*, 26 B. T. A. 1188; *Faber vs. United States*, 1 F. Supp. 859 (C. Cls.). The mere reading of Section 166 of the Revenue Act of 1934 makes it clear that the only object of the amendment was to make it include all trusts where the settlor had a vested right of revocation.[6] Senator Murphy, when he introduced the proposed amendment made it perfectly clear that this was the purpose (78 Cong., Rec. 6471-6472). The Conference Committee shows the same purpose. *Report—Conference Committee* (73d Cong., 2d Sess., H. Rept. 1385):

> "Amendments nos. 96 and 97: Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year. If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include the trust income for the taxable year in his return. The Senate

---

[6]The exact amendment appears from the following quotation of Section 166, wherein the words eliminated by the 1934 Revenue Act have been set in boldface.

"Where at any time **during the taxable year** the power to revest in the grantor title to any part of the corpus of the trust is vested—

"(1) in the grantor * * *

"(2) * * *

"then the income of such part of the trust **for such taxable year** shall be included in computing the net income of the grantor."

> amendments require the income from trusts of this type to be reported by the grantor. The House recedes (p. 24)."

If further confirmation were needed, it is found in the specific request of the Treasury Department for a provision covering short-term trusts, which request was denied. A subcommittee of the House Ways and Means Committee made a report on a proposed revenue bill. C. C. H., Standard Federal Tax Service, 1934, III, page 6673. The Treasury Department, after examining this report, made a statement regarding it (*ibid.*, page 6697). In this statement, the Treasury suggested certain additional recommendations, including the following (*ibid.*, page 6707):

> "(6) The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust."

The conclusion seems inescapable: The Treasury desired to amend the revenue laws in two distinct particulars; Congress amended the Act to include "trusts which are revocable by the creator at the expiration of a short period after notice by him"; Congress did not amend the Act to include "short-term trusts."

4. What Congress refused to do, the Department would claim to have accomplished by its Regulations. Regulations 77, Article 881, issued under the Revenue Act of 1932, c. 209, 47 Stat. 169, substantially restated Sections 166 and 167 of the Revenue Act of 1932. There was no suggestion that term trusts were taxable. The theory that reversion in the corpus subjected the grantor to tax on the income of the trust was first incorporated in Treasury Regulations 86, Article 166-1. These regulations purported to tax the in-

come of a trust to the grantor if he retained any interest in the trust "how great or how small, how remote or how contingent the interest may be."[7] This position had at least the merit of consistency. This view was abandoned in an amendment of Article 166-1 on March 7, 1936 (T. D. 4629, XV-1, Cum. Bull. 140), when the Article was redrafted in substantially its present form.

In *Downs vs. Commissioner*, 36 B. T. A. 1129, the grantor created a trust for her daughter-in-law to the extent of four thousand dollars ($4,000.00) per annum for life or until her remarriage, any excess of income to be paid to grantor and any deficiency in the income in any year to be made up out of corpus. Upon death or remarriage of the daughter-in-law, the trust was to terminate and the corpus was to revert to the grantor. The Board held four thousand dollars ($4,000.00) income in the year 1934 was not taxable to the grantor. The Board said at page 1137:

> "Respondent has not argued that the possibility of a reversion to the grantor upon the death or re-marriage of Anne Merrick Downs brings the trust within section 166. A possibility of a reverter is, in our opinion, different from 'the power to revest' which is comprehended by section 166. We have here a trust for an indefinite

---

[7]The original Article 166-1 of Regulations 86 is printed in full in Appendix. The scope of the article appears from the following extract:

"(b) **Test of taxability to the grantor.**—The sufficiency of the grantor's retained interest in the corpus resulting in the taxation of its income to the grantor is determined by a single test, namely, whether the grantor has failed to divest himself, permanently and definitively, of every right which might by any possibility enable him once more to possess and enjoy in title the trust corpus. * * *

* * * * * * * * * *

"If the grantor has retained any such interest in the corpus he is taxable on the income therefrom regardless of—

"(1) how great or how small, how remote or how contingent the interest may be."

term, '*pour autre vie*' or until the occurrence of a contingency over which the grantor has no control. No exercise of volition by the grantor is required nor would have any effect upon the return of the corpus to her. When and if it returns to the grantor or her assignees or appointees it will return by operation of the terms of the trust instrument itself and not by the exercise of any 'power' retained by the grantor. We believe such a trust is not covered by the terms of intendment of section 166. See *United States vs. First National Bank of Birmingham*, 74 F. (2d) 360, where a trust for a term of one year at the end of which the trust property would revert to the grantor was held to be without the scope of section 166 of the Revenue Act of 1928, which contains language of apparently the same import in the particulars material to this question as section 166 of the Revenue Act of 1934."

The Commissioner acquiesced in this decision. Cum. Bull. 1938—1, p. 9.

Thereafter, the Department issued a definite ruling that a settlor was not taxable on income of a trust because he retained a reversionary interest. I. T. 3238, Cum. Bull. XVII-2, p. 204. "Under a trust indenture dated December ...., 1923, A created a trust for the benefit of his wife. Pursuant to the provisions thereof, he conveyed assets to trustees who were authorized to collect the income therefrom and pay it to his wife annually, or oftener, as long as she lives. Upon her death the principal of the trust, or so much thereof as may remain, is to be paid over to the grantor if living. In the last paragraph of the trust instrument, the grantor expressly reserves to himself the power to alter at any time any terms of the trust but not to revoke the trust or change its provisions so that the income would be paid to him during the lifetime of his wife." After stating the facts, the ruling referred specifically to Article 166-1, Regulations, as

then amended, Section 166 of the Revenue Act of 1934, and *Downs vs. Commissioner, supra*, and then concluded that the income of the trust for 1934 and 1935 was not taxable to the grantor:

> "In view of the above decision of the Board of Tax Appeals, in which the Bureau has acquiesced, it is held that inasmuch as the entire income of the trust is distributable to the beneficiary and the possible future revesting of the corpus of the trust in the grantor is governed entirely by the terms of the trust instrument itself and is in no way dependent upon the exercise of any power vested in the grantor or any person not having a substantial adverse interest therein, the income of the trust is not taxable to the grantor."

There is no basis for assuming that Congress adopted the administrative construction by re-enacting without change Section 166 or Section 22 (a). Not only were the regulations without statutory basis, but they were clearly contrary to plain language and the meaning of the statute. *Smietanka vs. First Trust and Savings Bank, supra; United States vs. Missouri Pacific Railroad Co.*, 278 U. S. 269; *Kashland vs. Helvering*, 298 U. S. 441; *M. E. Blatt Co. vs. United States*, 305 U. S. 267. Furthermore, the construction has not been uniform. *Iselin vs. United States*, 270 U. S. 245.

5. What seems so clear on principle is sought to be confused in petitioner's brief by such phrases as these: "There is no occasion minutely to examine the particular words of Section 22 (a) (Brief, 9)"; "there is no real question of the constitutional power of Congress to tax respondent on this income (Brief, 10)"; "since the regulation cannot be said to be clearly in conflict with the statute, the repeated re-enactment of the statute compels the conclusion that Congress has adopted the administrative

construction (Brief, 12)"; "these regulations certainly cannot be said to be so arbitrary as to be clearly in conflict with the statutory provision (Brief, 13)"; "it is evident, we think, that Article 166-1 cannot be said to be arbitrary or in clear conflict with the statute in prescribing that this income must be taxed to the respondent (Brief, 15)"; "*Du Pont vs. Commissioner*, 289 U. S. 685, shows that these settled principles have direct application to the short-term trust (Brief, 16)." The medley confuses several distinct and proper principles. The argument employs as a rule of statutory construction a test of constitutionality. It is a statute and not a constitution which is being interpreted and applied. It is the validity of a regulation and not of a statute that is to be determined. *Burnet vs. Wells*, 289 U. S. 674. The Revenue Act did not give to the Treasury Department the broad power to legislate which the Constitution gives to Congress. There have been those who have suggested that such power is not given to this court. Certainly unambiguous language was available to Congress if in 1934 any such change in law had been contemplated as is now urged by the Commissioner, and the change would have been explained to the members of Congress.

Article 166-1 of the Regulations draws no clear line. If it attempted to do so, it would show more clearly that it is in the nature of legislation. It determines a new policy, which is not referable to any existing statute or established principles. The problem is one for legislative determination.[8] The method proposed by the Regulations could only result in conflicting rulings in particular cases. There is no reason why the doctrine of substantial ownership once

---

[8]See English statute, which specifically taxes to the grantor income of an irrevocable trust for a term of six years. (12-13 Geo. V, c. 17, Sec. 20 (1922).

established should not be applied in other fields. The litigation of which the Department now complains will hardly have commenced.[9]

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

F. H. Stinchfield,
Thomas P. Helmey,
Attorneys for Respondent.

Stinchfield, Mackall, Crounse,
McNally & Moore,
Of Counsel.

January, 1940.

---

[9]We have not argued the constitutional issues because they do not appear to be raised by the present statutes. The only apparent statutory basis for imposing such tax liability is Section 166. The application for the Writ stressed this basis (Petitioner, 4-8). If Section 166 is construed to apply to the present facts on the broad ground that the settlor is taxable upon income from any trust in which he retains a reversionary interest, the section appears to be clearly unconstitutional in taxing to A the income of B: **Hoeper vs. Tax Commission,** 284 U. S. 206; **Heiner vs. Donnan,** 285 U. S. 312. If the statute could be construed to include only term trusts of five years, the statute would make an encroachment upon the rule that A's income cannot be taxed to B beyond that permitted by any decision of this court. Cf. **Burnet vs. Wells,** 289 U. S. 670; **Du Pont vs. Commissioner,** 289 U. S. 685. In both of these cases, the beneficiary was not given the unrestricted use of the income as in the present case (R. 23, 24). At the least, if there be any doubt as to constitutionality, the statute should be construed to avoid any constitutional question. **Federal Trade Commission vs. American Tobacco Co.,** 264 U. S. 298; **Knowlton vs. Moore,** 178 U. S. 41.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

(U. S. C., Title 26, Sec. 22.)

Sec. 166. Revocable Trusts.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 166.)

Sec. 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * * * * *

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 166-1. Trusts in the corpus of which the grantor retains an interest.—(a) *Scope.*—Section 166 prescribes that the income, or any part of the income, of certain trusts shall be taxed, not to the trustee nor to

the beneficiaries, but to the grantor because of the fact that the grantor has retained a certain interest in the property of the trust. This article deals with the taxation of such income. The term "corpus," as used in this article, means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) *Test of taxability to the grantor.*—The sufficiency of the grantor's retained interest in the corpus resulting in the taxation of its income to the grantor is determined by a single test, namely, whether the grantor has failed to divest himself, permanently and definitively, of every right which might by any possibility enable him once more to possess and enjoy in title the trust corpus. For the purposes of this article the sufficiency of the grantor's retained interest in the corpus is not affected by the fact that the grantor has provided that the right to cause the title to the corpus to revest in himself is, or may at some future time be, vested in any person (either alone or in conjunction with the grantor) not having a substantial interest in the corpus or income therefrom adverse to the grantor.

If the grantor has retained any such interest in the corpus he is taxable on the income therefrom regardless of—

(1) how great or how small, how remote or how contingent the interest may be;

(2) whatever the nature of interest retained may be; whether the interest retained is vested, contingent, in reversion or otherwise; whether conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event; whether taken by appointment, or by designation in the trust instrument, or merely by virtue of the grantor not conveying his whole estate in the corpus, or otherwise;

(3) the time or times at which such interest

will revest the title in the grantor in possession and enjoyment, whether within or without the taxable year, whether or not the time be fixed, determinable or certain to come;

(4) whether, if the revesting in the grantor of title to the corpus is in any way dependent upon the act of anyone, that person be the grantor, or any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

For example, a grantor has not permanently or definitively divested himself of title to the corpus if he has placed it in trust for his son, John,

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not being a beneficiary, but being empowered to appoint to anyone other than herself); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor has provided that the title shall or may once more revest in himself by the retention of an interest (executory or otherwise) capable of vesting title in the grantor in possession and enjoyment, in (A) upon the expiration of the trust pe-

riod if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

Thus the inclusion within the scope of section 166 of any trust is based on the fact that the grantor has retained an interest in the corpus which once more will, or may possibly, vest the title in him in possession and enjoyment. Section 166 makes no distinction between a "revocable trust" (so called because of a provision in the trust instrument permitting some person at some time or in some manner to terminate the trust) and an "irrevocable trust" as such. Some "revocable trusts" are within the scope of section 166, not however by reason of the element of revocability, but because the grantor has reserved the requisite interest in the trust corpus, whether the vesting in title of such interest depends on revocation or otherwise. If no such interest has been retained, a "revocable trust" is not within the scope of section 166, even though the particular trust estate is subject to revocation by the grantor.

If the grantor strips himself permanently and definitively of every such interest in the corpus retained by him, the income of the trust realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161 and 162.

(c) *Income and deductions.*—If, as to any of the corpus, the test of taxability to the grantor is satisfied, the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to such corpus as he would have been entitled to had the trust not been created.

SUPREME COURT OF THE UNITED STATES.

No. 383.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* George B. Clifford, Jr.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 26, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

In 1934 respondent declared himself trustee of certain securities which he owned. All net income from the trust was to be held for the "exclusive benefit" of respondent's wife. The trust was for a term of five years, except that it would terminate earlier on the death of either respondent or his wife. On termination of the trust the entire corpus was to go to respondent, while all "accrued or undistributed net income" and "any proceeds from the investment of such net income" was to be treated as property owned absolutely by the wife. During the continuance of the trust respondent was to pay over to his wife the whole or such part of the net income as he in his "absolute discretion" might determine. And during that period he had full power (a) to exercise all voting powers incident to the trusteed shares of stock; (b) to "sell, exchange, mortgage, or pledge" any of the securities under the declaration of trust "whether as part of the corpus or principal thereof or as investments or proceeds and any income therefrom, upon such terms and for such consideration" as respondent in his "absolute discretion may deem fitting"; (c) to invest "any cash or money in the trust estate or any income therefrom" by loans, secured or unsecured, by deposits in banks, or by purchase of securities or other personal property "without restriction" because of their "speculative character" or "rate of return" or any "laws pertaining to the investment of trust funds"; (d) to collect all income; (e) to compromise, etc., any claims held by him as trustee; (f) to hold any property in the trust estate in the names of "other persons or in my own

MICRO CARD 22

TRADE MARK ®

39

MATTHEW BENDER & COMPANY

1351

65

microcard

name as an individual" except as otherwise provided. Extraordinary cash dividends, stock dividends, proceeds from the sale of unexercised subscription rights, or any enhancement, realized or not, in the value of the securities were to be treated as principal, not income. An exculpatory clause purported to protect him from all losses except those occasioned by his "own wilful and deliberate" breach of duties as trustee. And finally it was provided that neither the principal nor any future or accrued income should be liable for the debts of the wife; and that the wife could not transfer, encumber, or anticipate any interest in the trust or any income therefrom prior to actual payment thereof to her.

It was stipulated that while the "tax effects" of this trust were considered by respondent they were not the "sole consideration" involved in his decision to set it up, as by this and other gifts he intended to give "security and economic independence" to his wife and children. It was also stipulated that respondent's wife had substantial income of her own from other sources; that there was no restriction on her use of the trust income, all of which income was placed in her personal checking account, intermingled with her other funds, and expended by her on herself, her children and relatives; that the trust was not designed to relieve respondent from liability for family or household expenses and that after execution of the trust he paid large sums from his personal funds for such purposes.

Respondent paid a federal gift tax on this transfer. During the year 1934 all income from the trust was distributed to the wife who included it in her individual return for that year. The Commissioner, however, determined a deficiency in respondent's return for that year on the theory that income from the trust was taxable to him. The Board of Tax Appeals sustained that redetermination (38 B. T. A. 1532). The Circuit Court of Appeals reversed (105 F. (2d) 586). We granted certiorari because of the importance to the revenue of the use of such short term trusts in the reduction of surtaxes.

Sec. 22(a) of the Revenue Act of 1934 (48 Stat. 680) includes among "gross income" all "gains, profits, and income derived . . . from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any

source whatever." The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories. Cf. *Helvering* v. *Midland Mutual Life Insurance Co.*, 300 U. S. 216. Hence our construction of the statute should be consonant with that purpose. Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue. That issue is whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus. See *Blair* v. *Commissioner*, 300 U. S. 5, 12. In absence of more precise standards or guides supplied by statute or appropriate regulations,[1] the answer to that question must depend on an analysis of the terms of the trust and all the circumstances attendant on its creation and operation. And where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary lest what is in reality but one economic unit be multiplied into two or more[2] by devices which, though valid under state law, are not conclusive so far as § 22(a) is concerned.

In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created. Rather, the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a).

So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created, as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. There were, we may assume, exceptions, such as his disability to make a gift of the corpus to others during the term of the trust and to make loans to himself. But this dilution in his control would seem to be insignificant and immaterial, since control over investment remained. If it be said

---

[1] We have not considered here Art. 166-1 of Treasury Regulations 86 promulgated under § 166 of the 1934 Act and in 1936 amended (T. D. 4629) so as to rest on § 22(a) also, since the tax in question arose prior to that amendment.

[2] See Paul, The Background of the Revenue Act of 1937, 5 Univ. Chic. L. Rev. 41.

that such control is the type of dominion exercised by any trustee, the answer is simple. We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position. It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact. For as a result of the terms of the trust and the intimacy of the familial relationship respondent retained the substance of full enjoyment of all the rights which previously he had in the property. That might not be true if only strictly legal rights were considered. But when the benefits flowing to him indirectly through the wife are added to the legal rights he retained, the aggregate may be said to be a fair equivalent of what he previously had. To exclude from the aggregate those indirect benefits would be to deprive § 22(a) of considerable vitality and to treat as immaterial what may be highly relevant considerations in the creation of such family trusts. For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed—so long as it stays in the family group. In those circumstances the all-important factor might be retention by him of control over the principal. With that control in his hands he would keep direct command over all that he needed to remain in substantially the same financial situation as before. Our point here is that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and are appropriate foundations for findings on that issue. Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22(a). To hold otherwise would be to treat the wife as a complete stranger; to let mere formalism obscure the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements.

The bundle of rights which he retained was so substantial that respondent cannot be heard to complain that he is the "victim of des-

potic power when for the purpose of taxation he is treated as owner altogether." See *Dupont* v. *Commissioner*, 289 U. S. 685, 689.

We should add that liability under § 22(a) is not foreclosed by reason of the fact that Congress made specific provision in § 166 for revocable trusts, but failed to adopt the Treasury recommendation in 1934, *Helvering* v. *Wood*, — U. S. —, that similar specific treatment should be accorded income from short term trusts. Such choice, while relevant to the scope of § 166, *Helvering* v. *Wood*, *supra*, cannot be said to have subtracted from § 22(a) what was already there. Rather, on this evidence it must be assumed that the choice was between a generalized treatment under § 22(a) or specific treatment under a separate provision[3] (such as was accorded revocable trusts under § 166); not between taxing or not taxing grantors of short term trusts. In view of the broad and sweeping language of § 22(a), a specific provision covering short term trusts might well do no more than to carve out of § 22(a) a defined group of cases to which a rule of thumb would be applied. The failure of Congress to adopt any such rule of thumb for that type of trust must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of § 22(a).

In view of this result we need not examine the contention that the trust device falls within the rule of *Lucas* v. *Earl*, 281 U. S. 111 and *Burnet* v. *Leininger*, 285 U. S. 136, relating to the assignment of future income; or that respondent is liable under § 166, taxing grantors on the income of revocable trusts.

The judgment of the Circuit Court of Appeals is reversed and that of the Board of Tax Appeals is affirmed.

It is so ordered.

---

[3] As to the disadvantage of a specific statutory formula over more generalized treatment see Vol. I, Report, Income Tax Codification Committee (1936), a committee appointed by the Chancellor of the Exchequer in 1927. In discussing revocable settlements the Committee stated, p. 298:

"This and the three following clauses reproduce section 20 of the Finance Act, 1922, an enactment which has been the subject of much litigation, is unsatisfactory in many respects, and is plainly inadequate to fulfil the apparent intention to prevent avoidance of liability to tax by revocable dispositions of income or other devices. We think the matter one which is worthy of the attention of Parliament."

SUPREME COURT OF THE UNITED STATES.

No. 383.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* George B. Clifford, Jr. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 26, 1940.]

Mr. Justice Roberts.

I think the judgment should be affirmed.

The decision of the court disregards the fundamental principle that legislation is not the function of the judiciary but of Congress.

In every revenue act from that of 1916 to the one now in force a distinction has been made between income of individuals and income from property held in trust.[1] It has been the practice to define income of individuals, and, in separate sections, under the heading "Estates and Trusts", to provide that the tax imposed upon individuals shall apply to the income of estates or of any kind of property held in trust. A trust is a separate taxable entity. The trust here in question is a true trust.

While the earlier acts were in force creators of trusts reserved power to repossess the trust corpus. It became common also to establish trusts under which, at the grantor's discretion, all or part of the income might be paid to him, and to set up trusts to pay life insurance premiums upon policies on the grantor's life. The situation was analogous to that now presented. The Treasury, instead of asking this court, under the guise of construction, to amend the act, went to Congress for new legislation. Congress provided, by § 219(g)(h) of the Revenue Act of 1924, that if the grantor set

[1] Revenue Act of 1916, 39 Stat. 756, § 2(a)(b); Revenue Act of 1918, 40 Stat. 1057, § 213(a), § 219; Revenue Act of 1921, 42 Stat. 227, § 213(a), § 219; Revenue Act of 1924, 43 Stat. 253, § 213(a), § 219; Revenue Act of 1926, 44 Stat. 9, § 213(a), § 219; Revenue Act of 1928, 45 Stat. 791, § 22(a), §§ 161 to 169, incl.; Revenue Act of 1932, 47 Stat. 169, § 22(a), §§ 161 to 169 incl.; Revenue Act of 1934, 48 Stat. 680, § 22(a), §§ 161 to 167, incl.; Revenue Act of 1936, 49 Stat. 1648, § 22(a), §§ 161 to 167, incl.

up such a life insurance trust, or one under which he could direct the payment of the trust income to himself, or had the power to revest the principal in himself *during any taxable year,* the income of the trust, for the taxable year, was to be treated as his.[2]

After the adoption of these amendments taxpayers resorted to the creation of revocable trusts with a provision that more than a year's notice of revocation should be necessary to termination. Such a trust was held not to be within the terms of § 219(g) of the Revenue Act of 1924, because not revocable within the taxable year.[3]

Again, without seeking amendment in the guise of construction from this court, the Treasury applied to Congress, which met the situation by adopting § 166 of the Revenue Act of 1934, which provided that, in the case of a trust under which the grantor reserved the power *at any time* to revest the corpus in himself, the income of the trust should be considered that of the grantor.

The Treasury had asked that there should also be included in that act a provision taxing to the grantor income from short term trusts. After the House Ways and Means Committee had rendered a report on the proposed bill, the Treasury, upon examination of the report, submitted a statement to the Committee containing recommendations for additional provisions; amongst others, the following: "(6) The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust." Congress adopted an amendment to cover the one situation but did not accept the Treasury's recommendation as to the other.[4] The statute, as before, clearly provided that the income from a short term irrevocable trust was taxable to the trust, or the beneficiary, and not to the grantor.

The regulations under § 166 of the Act of 1932 contained no suggestion that term trusts were taxable to the creator though, if the petitioner is right, they would be equally so under that act as under later ones. Thus though the Treasury realized that irre-

---

[2] See Corliss *v.* Bowers, 281 U. S. 376; Burnet *v.* Wells, 289 U. S. 670.

[3] Lewis *v.* White, 56 F. (2d) 390; 61 F. (2d) 1046; Langley *v.* Commissioner, 61 F. (2d) 796; Commissioner *v.* Grosvenor, 85 F. (2d) 2; Faber *v.* United States, 1 F. Supp. 859.

[4] Hearings on H. R. 7835, 73d Cong., 2d Sess., p. 151; H. R. 1385, 73d Cong., 2d Sess., p. 24.

vocable short term trusts did not fall within the scope of § 166, instead of going to Congress for amendment of the law it comes here with a plea for interpretation which is in effect such amendment.

Its claim, in support of this effort, that a reversionary interest in the grantor is a "power to revest" the corpus within the meaning of § 166 so as to render the income taxable to the grantor is plainly untenable.[5] That theory was first advanced in a regulation issued under the 1934 act,[6] but was abandoned March 7, 1936, when the regulation was revised to read substantially in its present form.[7] The Board of Tax Appeals held a possibility of reverter is not the "power to revest" described in § 166.[8] The petitioner acquiesced in the decision.[9] The Treasury thereafter ruled that a grantor was not taxable on the income of a trust where he had retained a reversionary interest.[10]

I think it clear that the administrative interpretation has not been consistent and that reenactment of § 166 is, therefore, not a ratification by Congress of the present construction.

The revised regulations indicating that in some circumstances the separate taxability of the trust may be ignored are said to rest on § 166, and also on § 22(a) which defines income. The regulation is not only without support in the statute but contrary to the entire statutory scheme and, as it now stands, is vague and meaningless, as respects the taxability to the grantor of income from an irrevocable term trust.

To construe either § 166 or § 22(a) of the statute as justifying taxation of the income to respondent in this case is, in my judgment, to write into the statute what is not there and what Congress has omitted to place there.

If judges were members of the legislature they might well vote to amend the act so as to tax such income in order to frustrate avoidance of tax but, as judges, they exercise a very different function. They ought to read the act to cover nothing more than Con-

5 United States *v.* First National Bank, 74 F. (2d) 360; Corning *v.* Commissioner, 104 F. (2d) 329.

6 Regulations 86, Art. 166-1.

7 T. D. 4629, C. B. XV-1, 140.

8 Downs *v.* Commissioner, 36 B. T. A. 1129.

9 C. B. 1938-1, p. 9.

10 I. T. 3238, C. B. XVII-2, p. 204.

gress has specified. Courts ought not to stop loopholes in an act at the behest of the Government, nor relieve from what they deem a harsh provision plainly stated, at the behest of the taxpayer. Relief in either case should be sought in another quarter.

No such dictum as that Congress has in the income tax law attempted to exercise its power to the fullest extent will justify the extension of a plain provision to an object of taxation not embraced within it. If the contrary were true, the courts might supply whatever they considered a deficiency in the sweep of a taxing act. I cannot construe the court's opinion as attempting less.

The fact that the petitioner is in truth asking us to legislate in this case is evident from the form of the existing regulation and from the argument presented. The important portion of the regulation reads as follows: "In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: The fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstance bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus."

In his brief the petitioner says:

"On the other hand, the income of a long term irrevocable trust which committed the possession and control of the corpus to an independent trustee *would not likely* be taxed to the settlor merely because of a reversionary interest. The question here, as in many other tax problems, is *simply one of degree*. The grantor's liability to tax must depend upon whether he retains so many of the attributes of ownership as to require that he be treated as the owner for tax purposes, or whether he has given up the substance of his dominion and control over the trust property.

"Under these circumstances, the question of *precisely where the line should be drawn* between those irrevocable trusts which deprive the grantor of command over the trust property and those

which leave in him the practical equivalent of ownership is, in our view, *a matter peculiarly for the judgment of the agency charged with the administration of the tax law.*" (Italics supplied.)

It is not our function to draw any such line as the argument suggests. That is the prerogative of Congress. As far back as 1922, Parliament amended the British Income Tax Act, so that there would be no dispute as to what short term trust income should be taxable to the grantor, by making taxable to him any income which, by virtue of any disposition, is payable to, or applicable for the benefit of, any other person for a period which cannot exceed six years.[11]

If some short term trusts are to be treated as non-existent for income tax purposes, it is for Congress to specify them.

Mr. Justice McReynolds joins in this opinion.

11 12 and 13 Geo. 5, ch. 17, § 20, L. R. Statutes, Vol. 60, p. 373. Though the provision has been thought unsatisfactory, the suggestion made for improvement is that the matter be brought before Parliament for action.